Supreme Court of the United States. 1

OCTOBER TERM, 1900.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Plaintiff in Error, vs. DAVID W. EBAUGH, Defendant in Error.	Term No. 453. In Error to the Supreme Court of the State of South Carolina 2

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Preliminary.

Defendant in error moves for a dismissal of the writ of error in this case upon the ground that no federal question is involved. Coupled with the motion to dismiss is a motion to affirm upon the ground 3
that even if a federal question does exist, thereby conferring jurisdiction upon this Court, it is "frivlous," the contention being made that the writ of error herein was sued out "for delay only."

The motion to dismiss or affirm, as served upon counsel for plaintiff in error, is not sustained by affi-

4 davit or verification, so far as the "abstract of the case" in connection therewith is concerned, nor does such "abstract of the case" embody "so much of the record as will enable the Court to act understandingly without reference to the transcript." The motion and "abstract" are, therefore, insufficient and the motion should be denied, because this Court cannot be required to search through the transcript in a case in order to find grounds on which to support a motion to dismiss or affirm.

Callan *v.* Bransford, 139 U. S., 197, 198.
Carey *v.* Houston, &c., Ry Co., 150 U. S., 170–179.

5 We repel the suggestion of the motion that the writ of error in this case was sued out merely for purposes of delay. Counsel for defendant in error well know, and will doubtless admit, that we have recently requested them to stipulate that this case might be advanced for hearing in connection with the case of *Eastern Building and Loan Association* v. *Welling and Bonnoitt*, No. 190 upon the calendar of the present term of this court, and which also comes to this court upon writ of error to the Supreme Court of South Carolina, and involves questions almost identical with those arising in this case. Counsel will also doubtless admit that they declined to accede to this request. This shows whether
6 plaintiff in error seeks delay or not.

Again, the transcript shows that the judgment in the trial court in South Carolina was rendered January 24, 1900 (Transcript, p. 65); that an appeal to the Supreme Court of South Carolina was immediately taken (Transcript, pp. 65, 66); that the case was heard in the Supreme Court of South Carolina and the judgment affirmed on June 28, 1900 (Transcript, p. 66); that on August 28, 1900, a certified copy of the record in the State Supreme Court was obtained from the Clerk of that court (Transcript, p. 68); and that at the earliest practicable date thereafter MR. CHIEF JUSTICE FULLER had such record submitted to him upon the ground that the case in-

volved a federal question, and he allowed the writ 7
of error on October 1, 1900 (Transcript, p. 69); the completed transcript was then filed in this court on October 22, 1900 (Transcript, p. 86).

We submit that few cases have ever been brought to this court by writ of error to a State court more expeditiously, and we seek only to have this case heard and determined upon its merits, after full argument, at the earliest date when it can be reached.

Statement of the Case.

We cannot accept the "abstract of the case" in support of the motion to dismiss or affirm as a correct "history of this case," and, on the contrary, we 8
regret to say that it wholly fails to present to this Court the facts shown by the record, from a consideration of which the existence or non-existence of a "federal question" must be determined.

The facts of the case, as we find them in the record, are as follows:

I.—Plaintiff in error (defendant below) is a corporation organized under the laws of the State of New York, with its principal place of business in Syracuse, New York.

Transcript, p. 2.

II.—It was incorporated under Chapter 122 of the Laws of New York of 1851, as amended by Chapter 9
564 of the Laws of New York of 1875, and both of these laws were given in evidence, and appear in the record in this case.

Transcript, pp. 31–38.

III.—The corporate charter or articles of incorporation were given in evidence, and appear in the record.

Transcript, pp. 47–53.

IV.—The by-laws of the corporation were also given in evidence, and appear in the record.

Transcript, pp. 54–62.

10 V.—The case of *O'Malley* v. *People's Building & Loan Association*, reported in 92 Hun (N. Y.), 572, was also formally given in evidence in behalf of the corporation.

Transcript, pp. 38-41.

VI.—D. A. Pierce, a witness called in behalf of the corporation, qualified himself as an expert to testify to the laws of the State of New York, showed his special familiarity with the laws of that State applicable to building and loan associations, specifically testified that the Laws of 1851 and 1875, aforesaid, were the governing acts under which plaintiff in-error was incorporated, and then testifies
11 that "under the statute under which defendant corporation is incorporated and the defendant's articles of incorporation and by-laws and the decisions of the courts of the State of New York, the defendant is not bound to mature its stock within the time specified, if any, on the face of the certificates, say 78 months or any other fixed period, regardless of the actual value of said stock at the expiration of said fixed period, said value depending, of course, upon the payment of dues made thereon and their *pro rata* share of the earnings; that any period of maturity fixed or indicated in the certificates of stock in any way is simply an estimated period, and that the association is not required to pay the face
12 value thereof at the expiration of any such period, unless the amount paid in thereon together with the earnings apportioned thereto shall equal the par value of the shares."

Transcript, pp. 41, 42.

VII.—It was also agreed upon the trial "that the New York Reports can be referred to and the decisions shall be considered parts of the case."

Transcript, p. 16.

VIII.—Under this stipulation, counsel for the corporation gave in evidence the cases of *Englehardt*

v. *Fifth Ward Dime Savings Assn.*, reported 148 N. Y., 281; *People* v. *Lowe*, reported 117 N. Y., 175; *Concordia Savings, &c, Assn.* v. *Read*, reported 93 N. Y., 474; and thereupon defendant in error (plaintiff below) introduced under said agreement of counsel the cases of *Whitney* v. *Barlow*, reported 63 N. Y., 62; *De Graff* v. *American Linen Thread Co.*, reported 21 N. Y., 124; and *Diamond Match Co.* v. *Roeber*, reported 106 N. Y., 473. 13

IX.—Upon the trial "the Referee was requested by defendant's attorney to give full faith and credit to the laws of New York under Article IV., § 1 of the United States Constitution and under § 905 of the Revised Statutes of the United States." 14

Transcript, p. 16.

X.—The case was heard in the trial Court before a referee. The report of the Referee was against the corporation (Transcript, pp. 24–28) and the Referee in his findings expressly refused to be bound by and give effect to the statutes and judicial decisions of the State of New York, in accordance with the terms of those statutes and the meaning and effect of those decisions in the State of New York.

Transcript, pp. 26, 27, 28.

The report of the Referee was excepted to by counsel for the corporation upon numerous grounds, among others, "That the Referee erred in not giving full faith and credit to the laws of New York, under Article IV., § 1 of the Constitution of the United States and under § 905 of the Revised Statutes of the United States." 15

Transcript, pp 29, 30, Finding XII.

The report of the Referee was confirmed and judgment rendered thereon in the Court of Common Pleas for the County of Greenville, the exceptions to the Referee's report being overruled and judg-

16 ment rendered against the plaintiff in error, the judge of that Court holding that the decisions of the Supreme Court of South Carolina in the cases of *Williamson* v. *Eastern Building and Loan Association* and *Welling and Bennoitt* v. *Eastern Building and Loan Association*, previously decided by the Supreme Court of South Carolina, were controlling upon the questions involved.

Transcript, pp. 62-65.

XII.—Exceptions to the decision and judgment of the Court of Common Pleas were duly taken, and what seem to be several distinct "federal questions" were raised by these exceptions.

17 Transcript, p. 65; Exceptions, 1, 2, 3, 4, 5.

XIII.—Upon these exceptions on appeal the case was heard and determined in the Supreme Court of South Carolina and the judgment of the lower Court "affirmed."

Transcript, pp. 66, 68.

XIV.—In the case of *Welling and Bennoitt* v. *Eastern Building and Loan Association*, 56 S. C., 280, the Supreme Court of South Carolina, in its opinion in that case, laid down the following proposition of law: "The appellant, however, contends that the
18 said agreement and the by-laws are to be construed under the laws of New York. * * * This is not a right of either State, but is permitted and accepted by the States for mutual interest and convenience, from a sense of the inconvenience which would otherwise result, and from a moral necessity to do justice in order that justice may be done in return. Without this rule the law of one State can have no force in another. But there is no comity among the Courts of the different States. * * * It is the duty of every State to look to the interests of its own subjects. Comity being voluntary and not obligatory, cannot supersede all discretion on the

subject. * * * No State can demand the 19
recognition of its laws in another, if they are deemed by the latter to be impolitic or unjust, of bad morals, or injurious to the rights of its citizens, or against its public policy. * * * It thus appears that the State is not compelled from mere comity to recognize the laws of New York for the reasons stated. The agreement herein is, in our opinion, injurious to the interests of our people, *and whatever may be the laws of New York, we do not think they should be enforced in this State.*"

56 S. C., 280, 296 297.

XV.—In the case at bar, the Supreme Court of South Carolina, following the reasoning in the *Wel-* 20
ling and Bonnoitt case, and citing that case as a controlling precedent, affirmed the judgment of the lower court, but, the *Welling and Bonnoitt* case having in the meantime been brought by writ of error to this court, the transcript in that case having been filed in the office of the Clerk of this court on January 27, 1900 (Transcript of Record in case of Welling and Bonnoitt, No. 17,620, Term No. 190, p. 117), the Supreme Court of South Carolina, in its opinion in the case at bar, while following literally the doctrine laid down in the *Welling and Bonnoitt* case, yet seeks to make it appear that its opinion and decision is in conformity with the laws and decisions of the State of New York, and that it has 21
construed the charter powers, duties and obligations of plaintiff in error and the contract of membership between plaintiff in error and defendant in error in accordance with the laws of New York. Says the Supreme Court of South Carolina in its opinion: "Both the Master and Circuit Judge find, as *matter of fact*, that the laws of New York do not forbid the defendant from entering into an agreement by which his shares of stock would mature in a definite time."

Transcript, p. 67.

22 It is then sought to rest the decision in this case solely upon the proposition that plaintiff in error could not escape liability to defendant in error upon the ground that it had entered into a contract or agreement "in excess of its charter powers or * * * unauthorized by law" (Transcript, pp. 67, 68), thus ignoring the fact that *this is not the question presented by the record in this case at all* and is a mere side issue imported into the case for the purpose of trying to avoid construing the membership obligations of defendant in error *as a stockholder* in plaintiff in error under and in accordance with the corporate charter and by-laws and the laws and judicial decisions of the State of New York.

23 Closing its opinion in this case, the Supreme Court of South Carolina says: "As the laws of New York are not in conflict with the construction which this Court has placed upon contracts similar to that upon which the action herein is founded, we fail to discover any facts causing us to differentiate this case from those hereinbefore mentioned."

Transcript, p. 68.

XVI.—The first "federal question" presented in this case is whether defendant in error as a stockholder in plaintiff in error was entitled, in an action brought by him, as a stockholder, to recover from plaintiff in error the amount of his contributions to

24 the capital stock of plaintiff in error, to have his rights and claims adjudicated and determined under the laws of South Carolina without regard to the articles of incorporation and by-laws, and statutes and decisions of the State of New York, or whether plaintiff in error was entitled, upon the trial of such action, to have full faith and credit accorded by the Courts of South Carolina to the statutes and judicial decisions of the State of New York, *with the right to have the same effect given to the statutes of New York and the articles of incorporation and by-laws of the plaintiff in error that had been and would be given to such*

laws, articles of incorporation and by-laws in the 25
State of New York by the courts of New York.
The denial of this right to plaintiff in error is manifest upon the face of the record in this case, as the following further statement will show.

XVII.—Defendant in error, as plaintiff below, brought his action upon a stock certificate of the Eastern Building and Loan Association, alleging himself to be a shareholder, and that for a period of 78 months he had made payments of dues or calls upon his stock to the association. He further alleged that under his contract of membership he was entitled, after the payment of 78 monthly installments of seventy-five cents each upon each share of 26
the stock subscribed for by him, to have such stock redeemed by the association at its full par or maturity value of $100 per share. He alleged the making of the stated number of payments and the failure of the association to pay him the par or maturity value of his stock. He did not allege that the stock had been fully paid or was matured.

Transcript, pp. 2-4.

XVIII.—Plaintiff in error (defendant below) answered, admitting that plaintiff below was a stockholder, but pleading specifically that his stock had not attained its par or maturity value, was not fully paid, and that under its articles of incorpora- 27
tion and by-laws and the laws of the State of New York it had no right, power or authority to make payment to the said plaintiff of the par value of his said stock or to pay to him anything more "than the sum paid in by him on said stock, plus the accumulated profits thereon less the *pro rata* share of expenses and losses of defendant corporation properly chargeable against said stock pursuant to its articles of incorporation and its by-laws, not inconsistent with said articles and said laws of the State of New York."

It was further alleged in the answer, "That any

provision in the certificate of stock issued by the defendant corporation to the plaintiff that the shares of stock held by him purporting or pretending to guarantee the maturity value thereof at any fixed time or period, without regard to the earnings and profits of the defendant corporation and the equal *pro rata* distribution of profits, losses and expenses of the defendant corporation among its stockholders is a contract or attempted contract *ultra vires* of the corporation, wholly beyond its corporate powers, in contravention of its articles of incorporation, by-laws and the laws of the State of New York by which it is governed, and unenforcible against it, *but that there is any such guaranty or agreement to pay is denied, and on the contrary it is alleged that in contemplation of law the promise to pay plaintiff's stock at its calculated maturity in 78 months was a mere estimate and not a guaranty that it would mature in that time from its share of earnings of the defendant corporation, plus the payments required thereon from the plaintiff.*"

It was further alleged in the answer that "at the time of the commencement of this action said shares of stock had not matured and become worth the sum of $100 per share and that said stock has not yet matured and become worth $100 per share from the amount paid in thereon by the plaintiff together with the full proportion of earnings of the defendant to which the same is entitled less the *pro rata* share of expenses and losses of the defendant association properly chargeable against said stock."

There were various other specific defenses interposed in the answer not necessary to mention so far as the present discussion is concerned.

Transcript, pp. 4–9, pars. 6, 7, 8, 9.

It will be seen from the foregoing that the real defense of the association upon which it relied was found in the fact that under its articles of incorporation and by-laws and the laws of the State of New York, it had no power to *guarantee* the maturity of

its stock at a fixed or definite time, and also that 31
under those laws and the decisions of the courts of New York construing such laws, the so-called guaranty of maturity was in fact only an estimate as to the time when the maturity of the stock would be attained, it being manifest from a simple arithmetical calculation that payments of seventy-five cents per share per month for a period of 78 months would not equal the par value of the stock at $100 per share, and, therefore, that if it was to attain its maturity value at the expiration of the 78 months' period, it would have to be through its participation in the earnings or profits of the corporation.

Transcript, p. 42, Deposition D. A. Pierce, and p. 44, Deposition Nathan 32
C. Visscher.

It follows that before the courts of South Carolina could adjudge that defendant in error, as plaintiff below, was entitled to recover the amount of the par value of his stock certificates from the association, they were compelled to hold not merely that a contract *ultra vires* of a corporation could be enforced against it under the laws of New York and of South Carolina, but, also, and this is where the first federal question specifically arises, that they would not enforce and give full faith and credit to the statutes of the State of New York under which the association was incorporated, to the decisions of the courts of 33
New York construing those statutes and to the articles of association and by-laws of the corporation, under all of which it is the settled law of the State of New York that a stockholder in a New York building and loan association cannot recover from the association the par or maturity value of his stock until the same has actually reached its par or maturity value by payment of calls or dues thereon, together with accruing profits, and that any stipulations in the stock certificates or literature of the corporation indicating or attempting to fix an earlier or different maturity value, will be treated as mere

34 estimates of maturity, not binding as contracts upon the corporation.

In the case at bar, the Supreme Court of South Carolina, while not in express words refusing to give full faith and credit to the laws of New York in this respect, does in fact, by its decision, refuse to do so, resting it upon the doctrine stated in the case of *Welling* v. *Association*, *supra*, namely, that "The agreement herein is in our opinion injurious to the interests of our people, and whatever may be the laws of New York, we do not think they should be enforced in this State."

56 S. C., 297.

35 XIX.—It appears from Chapter 122 of the laws of New York of 1851, and from the articles of incorporation and by-laws of the corporation, that the plaintiff in error is a purely mutual corporation without any fixed capital, except the sums paid in by its stockholders or members, and that the rights and duties of all stockholders are equal, mutual and reciprocal.

Transcript, pp. 31-35, 47-53, 54-62.

XX.—Section 1 of Chapter 122 of the Laws of New York of 1851, after stating the objects for which corporations of the nature of plaintiff in error may be organized, specifically limits the time
36 and the conditions upon which members shall be entitled to receive from the association the par value of their shares, namely, "when the funds of such association shall amount to a certain sum per share to be specified in the articles of association."

Transcript, p. 31.

Section 4 of the same act expressly authorizes the trustees or directors to require subscribers for stock to pay calls or dues thereon until the stock has been paid up to its par value, the clause in question reading as follows: "It shall be lawful for the trustees to call in and demand from the stockholders re-

spectively all such sums by them subscribed at such 37
time and in such payments or installments as the articles of association shall prescribe."

Transcript, p. 32.

The articles of incorporation of the plaintiff in error provide that "The entrance fee of new members and new shares shall be $1 per share of stock in said association. The monthly dues per share shall be seventy-five cents."

Transcript, pp. 49, 50; Articles of Incorporation, Par. IX.

Section 7 of the New York Act of 1851 reads as follows: 38

"Every such corporation shall terminate except for the purpose of settling its affairs, whenever all the shares thereof shall be redeemed by advances thereon; or whenever the owners of unredeemed shares shall be paid the ultimate value thereof as provided in the articles of association and not sooner, but no dividend of principal or of profits shall be made until such termination; nor until all the debts of the association shall have been paid or otherwise sufficiently provided for. No holder of redeemed shares shall claim to be exempt from making the monthly payment provided in the articles of association, *upon the ground that by reason of losses, or otherwise, the association has continued* 39
longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon; nor shall the imposition of fines for non-payment of dues or fees, or other violation of the articles of association, or of any premium for loans made to members, be deemed to be a violation of the provisions of any statute against usury."

Transcript, p. 32.

Section 11 of the Act of 1851 provides that "all shareholders of any association formed under this act

shall be individually liable to the creditors of said association to an amount equal to the amount of stock held by them respectively for all debts contracted by such association."

Transcript, p. 33.

Section 2 of said Act of 1851 authorizes the corporations organized under its provisions in their articles of association to determine "the entrance fee of new members and new shares, the monthly or weekly dues per share, the redemption fee on shares on which advances shall be made, and the fees to be paid on the transfer of shares, the fines or penalties for non-payment of dues or fees, and other violation of the articles of association, the manner of redemption of shares by advances made thereon, the mortgage security to be taken on such advances and how the same may be redeemed or changed, *the manner of transfer or withdrawal of shares*, the manner of investing funds not required for advances on shares, the qualification of voters at the meetings and the mode of voting (and) *the ultimate amount to be paid to the owners of unredeemed shares.*

Transcript, p. 31.

XXI.—The articles of association and by-laws contain no provision of any kind authorizing the payment to any stockholder of the par or maturity value of his stock at the expiration of 78 months from the date of its issue or at any other fixed or definite time. Article XII. does provide that shareholders upon certain conditions may withdraw their contributions to the capital stock of the corporation in advance of the maturity of the stock, but the gist of that provision is, that "upon such withdrawal the holder will be entitled to receive thereon the amount of the monthly installments that have been paid, with such additional interest, if any, as the by-laws may provide, *except that the same shall not exceed the net earnings of said stock.* * * * In

no case shall a withdrawal from the loan fund exceed the amount of the installments paid thereto, together with the estimated amount of the earnings upon the same." 43

Transcript, p. 51; Articles of Incorporation, Par. XII.

Paragraph XV. of the articles of incorporation fixes the par or maturity value of shares at $100 per share.

Transcript, p. 52.

XXII.—Article XI. of the by-laws provides for an expense fund, and that "ten cents per share per month from the monthly payments on stock" 44 shall be placed in this fund and be "devoted to the payment of operating expenses."

Transcript, p. 57; By-laws, Art. XI.

The by-laws further provide that "each share of stock shall be charged with any and all amounts that may be owing from the shareholder or his assigns to the Association, whether in dues, loans, fines, interest or premiums, and all certificates of stock in said association shall, whether mentioned therein or not, be subject to a lien thereon to secure any such indebtedness and the right to deduct and withhold the amount of any such indebtedness is hereby expressly reserved to 45 the association."

Transcript, p. 60.

And they also provide that "all shareholders shall pay, or cause to be paid, a monthly installment of seventy-five cents on each share named in their certificate *until the same shall be fully paid.*"

Transcript, p. 60.

And they also provide that "if shares are withdrawn at any time before maturity, the holders thereof will be entitled to receive the amount paid

46 into the loan fund in monthly payments," plus certain specified percentages of profit in certain cases.
Transcript, p. 60.

XXIII.—It is undisputed that the stock of the defendant in error had not reached its par or maturity value, and that his only right to claim the par value thereof from the association arises upon the provisions in the face of the certificate itself or from the literature of the company, which he claims the corporation is bound by in its relations with him as a stockholder, notwithstanding the provisions of the laws of the State of New York and the articles of incorporation and by-laws of the
47 plaintiff in error. In this connection we direct attention to the fact that under Chapter 564 of the Laws of New York of 1875, the trustees or directors of plaintiff in error would render themselves personally liable by paying to defendant in error the par value of his stock before the maturity thereof, it being manifest that they could only make such payment before the stock had matured out of the funds contributed by other members of the corporation.

XXIV.—Finally, and we regard this as conclusive upon this question, said Chapter 564 of the Laws of New York of 1875 provides that "No holder of re-
48 deemed shares shall claim to be exempt from making the monthly or other stated payments provided in the articles of association upon the ground that by reason of losses or otherwise the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon."
Transcript, p. 36, Laws of New York, Chapter 564, § 7.

That defendant in error is estopped from charging the plaintiff in error with deceit or fraud in procur-

ing his subscription for stock by representations as to the maturity of the stock in 78 months is shown by the following facts: 49

The association was not incorporated until February 22, 1890 (Transcript, p. 53). Hence it had never matured or paid any stock or demonstrated its earning capacity or rate of profits when Ebaugh's membership began.

He made a formal application for stock during 1892 (Transcript, p. 10) and his stock certificate was issued to him on April 1st, 1892 (Transcript, pp. 10-12). He accepted such stock certificate and seems to have exercised all the rights of membership from that date up to the 17th day of January, 50
1899, when he instituted his action in the State court (Transcript, pp. 2-4).

It certainly must be true that if advanced or borrowing members can be required to continue making payments of dues upon their stock until the same actually reaches its par or maturity value, even though the estimated period of maturity is exceeded, that non-borrowing or mere investing members cannot be permitted to withdraw the par value of their stock in excess of the amount paid in by them thereon at the expiration of the estimated period, and that such is the law of New York is settled by numerous decisions in that State and elsewhere. It is because of the failure and refusal of
the Supreme Court of South Carolina to give full 51
faith and credit to that law and to enforce it according to its clear meaning in the construction of the contract of membership between the plaintiff in error and the defendant in error that a federal question exists upon the face of this record in this case which will necessitate the denial of the motion to dismiss or affirm. Other federal questions also arise upon the face of the record to which attention will be directed later.

In opposition to the motion to dismiss or affirm we now respectfully submit the following brief and authorities.

BRIEF.

I.

UNDER THE LAWS OF NEW YORK, PLAINTIFF IN ERROR IS A PURELY MUTUAL CORPORATION, WHOSE STOCKHOLDERS HAVE EQUAL, MUTUAL AND RECIPROCAL RIGHTS, DUTIES AND OBLIGATIONS, AND NO ONE OF WHOM CAN LEGALLY BE ACCORDED, IN THE STATE OF NEW YORK, ANY ADVANTAGE, PREFERENCE OR PRIORITY OVER ANOTHER.

Ch. 122, Laws of N. Y., 1851, Transcript, pp. 31-35.

Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.

People *v.* Lowe, 117 N. Y., 175, 180.

Tindall, *C. J.*, in Silver *v.* Barnes, 6 Bing., N. C., 180; 8 Scott, 300; 37 Eng. Com. L., 335.

Robertson *v.* Homestead Assn., 10 Md., 397; s. c., 69 Am. Dec., 145.

Tilley *v.* Am. B. & L. Assn., 52 Fed. Rep., 618, 622.

Thompson on Building Associations (2d Ed.), §§ 3, 4.

"A mutual savings fund and loan association is purely a co-operative society, consisting of a partnership in the profits of money as a money maker, equitably distributed in proportion to the severalties of capital furnished by the individual members thereof."

Wrigley on Building Associations, p. 16.

II.

THE ARTICLES OF INCORPORATION AND BY-LAWS AND THE PROVISIONS OF CHAPTER 122 OF THE NEW YORK LAWS OF 1851, AND CHAPTER 564 OF THE NEW YORK LAWS OF 1875, ARE THE TEST OF THE RIGHTS AND OBLIGATIONS OF THE STOCKHOLDERS OF THE ASSOCIATION, AND BY THEM THE CONTRACT OF MEMBERSHIP MUST BE CONSTRUED, NOT ONLY IN NEW YORK BUT IN EVERY STATE OF THE UNION WHERE THE COURTS MAY BE CALLED UPON TO INTERPRET THE CONTRACT OF MEMBERSHIP.

Const. U. S., Art. IV., § 1.
Relfe *v.* Rundle, 103 U. S., 222, 225, 226.
Canada Southern Ry. *v.* Gebhard, 109 U. S., 527, 537.
Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.
Chase *v.* Curtis, 113 U. S., 452, 458.
Young *v.* Wempe, 46 Fed. Rep., 354.
Payson *v.* Withers, 5 Biss. (U. S.), 269, 278.
3 Thompson on Corp., § 3046.

And so it has been held by the courts of several States with reference to membership contracts between plaintiff in error and its stockholders.

Bennett *v.* Eastern B. & L. Assn., 177 Pa. St., 233; s. c., 55 Am. St. Rep., 723.
Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.

So important and directly in point is a decision of this character by the Supreme Court of Appeals of

Virginia, rendered on December 6, 1900, and not yet officially reported, that we subjoin a copy of such opinion by way of appendix to this brief.

Campbell *v.* Eastern B. & L. Assn., Appendix, *post*, p. 49.

It is settled law that contracts must be construed by the law of the place of performance.

Coghlan *v.* South Carolina R. R. Co., 142 U. S., 101, 109, 110.

Pritchard *v.* Norton, 106 U. S., 124, 136.

Liverpool, etc., Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 458.

Nor can it be denied that the place of performance of a contract of stock subscription with a corporation is at the corporate *situs*.

Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray (Mass.), 244.

1 Thomp. on Corp., § 1259.

3 Thomp. on Corp., § 3046.

And in the case at bar this obligation is fixed by the terms of the stock certificate which constitutes the cause of action of the defendant in error, one of the express conditions embodied on the certificate being: "All payments under this certificate are payable at home office of the Association at Syracuse, N. Y., within sixty days after the acceptance and approval of satisfactory proofs."

Transcript, p. 11.

Another provision of the certificate is that: "Any action brought against this Association shall be commenced within six months after filing proofs, and in the County of Onondaga and State of New York."

Transcript, p. 12.

The by-laws also provide as follows: "All remittances for advance instalments, premiums, monthly

instalments, fines and penalties, interest and premiums and all other payments shall be made to the Secretary of the Association at the Home office."

By-Laws, Art. XIV., § 16, Transcript, p. 60.

III.

UNDER THE LAWS OF NEW YORK AND THE ARTICLES OF ASSOCIATION AND BY-LAWS OF PLAINTIFF IN ERROR DEFENDANT IN ERROR COULD NOT, IN THE STATE OF NEW YORK, MAINTAIN AN ACTION OR RECOVER UPON HIS CERTIFICATE THE PAR OR MATURITY VALUE THEREOF IN ADVANCE OF THE ACTUAL MATURITY OF THE STOCK.

O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.
House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.
Heslin *v.* Eastern B. & L. Assn., 28 Misc. (N. Y.), 376, 378.
People *v.* Lowe, 117 N. Y., 175.
Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.
See also the provisions of the Act of 1851 of N. Y. and the Articles of Incorporation and By-Laws of Plaintiff in error, which expressly so provide, *ante*, pp. 12–16, fols. 35–48.

Notwithstanding that such is the settled law of New York, the Supreme Court of South Carolina affirmed the decision of the Court below, giving the defendant in error judgment for the *full par value* of his stock, although it affirmatively appeared by

undisputed evidence that the law of New York was as here stated, and that the stock had not matured. *Ante*, pp. 4, 9, 10, 11, fols. 10–12; 25–32.

We submit that by this judgment the Supreme Court of South Carolina (*a*) failed and refused to give full faith and credit to the laws and judicial proceedings of the State of New York in violation of § 1, Art. IV. of the Constitution of the United States, and to § 905 of the Revised Statutes of the United States; and (*b*) denied to plaintiff in error equal protection of the laws in contravention of the XIVth amendment to the Constitution of the United States; and (*c*) impaired the obligation of a contract in violation of § 10, Art. I. of the Constitution of the United States; and (*d*) deprived plaintiff in error of its property without due process of law in violation of the XIVth Amendment to the Constitution.

These Federal questions were fully raised in the courts below, and instead of being "frivolous," present as grave problems of constitutional right as any that have recently invoked the consideration of this Court.

IV.

BUT IT IS CONTENDED IN THE BRIEF IN SUPPORT OF THE MOTION TO DISMISS THAT NO FEDERAL QUESTION ARISES IN THIS CASE BECAUSE THE SUPREME COURT OF SOUTH CAROLINA DID NOT REST ITS DECISION UPON THE *express* DENIAL OF "FULL FAITH AND CREDIT" TO THE LAWS OF NEW YORK AS IT DID IN THE *Welling* CASE (*ante*, p. 7, fol. 19).

We meet this contention with the following propositions:

The judgment of the Supreme Court of South Carolina in favor of the defendant in error could

not have been rendered if the contract obligations of defendant in error as a *stockholder* in the Eastern Building and Loan Association had been determined in accordance with the laws and judicial decisions of New York as they would have been in the courts of New York.

The test of compliance with the rule of constitutional obligation that full faith and credit shall be given in each State to the laws of every other State, is that the same effect shall be given to them that would be given to them by the courts of such other State.

Chicago, &c., R. R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

There is no pretense in the opinion of the Supreme Court of South Carolina—or if there is, it is a *mere pretense*—that under the New York Act of 1851 and the articles of incorporation and by-laws of the Eastern Building and Loan Association, defendant in error was entitled to receive from the association the full par value of his stock before the actual maturity of the stock.

That Court accepts the pitiful evasion of the Referee and the Court below, that because the courts of New York have held in several cases that a corporation cannot avail itself of the plea of *ultra vires* as against a contract which has been performed in good faith by the other party, therefore a *stockholder* in a corporation is entitled to withdraw his contribution to the capital stock in direct violation of the corporate charter and the law under which the corporation was organized, merely because the *estimated* period of stock maturity has expired.

Transcript, pp. 64, 67.

This must rest upon the doctrine that a corporation of a purely mutual character can bind itself in violation of its charter powers by a guaranty that its stock shall have a certain value at a certain time, or earn a certain rate of dividends.

Yet nothing is better settled than that corporations cannot bind themselves by such guaranties and that dividends can be paid only from profits.

1 Morawetz on Corp. (2d Ed.), §§ 444, 457.

Mobile, etc., R. Co. *v.* Tennessee, 153 U. S., 486, 496.

New York, etc., R. Co. *v.* Nickals, 119 U. S., 296, 305, 306.

Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn., 703; s. c., 4 Am. St. Rep., 798.

2 Thompson on Corp, § 2152.

And this is particularly true of building and loan associations because of their strictly mutual character.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.

Miller *v.* Eastern B. & L. Assn. (Tenn.), 58 S. W. Rep., 231.

King *v.* International Bldg. etc., Union, 170 Ill., 135.

So the statute of New York, under which plaintiff in error is organized, expressly forbids the declaration or payment of any dividends to shareholders except from the earnings of the association.

"§ 7. The trustees of any association formed under the provisions of this act may, from time to time, declare dividends *from the earnings* of the association, payable in such manner as may be provided in the articles of association; *but no dividend shall be declared except from the earnings of the association.*"

Laws of N. Y., 1875, Ch. 564, § 1, amending Laws of N. Y., 1851, Ch. 122, § 7.

This leaves nothing for "construction" or "interpretation" so far as the contract between plain-

tiff in error and defendant in error, as a stockholder, is concerned.

But the Supreme Court of South Carolina says: "Both the Master and Circuit Judge find as matter of fact that the laws of New York do not forbid the defendant from entering into an agreement by which the shares would mature in a definite time" (Transcript, p. 67), and the Court adds that such finding is conclusive. Yet there is not a "scintilla" of evidence in the record upon which such a finding *as a finding of fact* can be based, all the *evidence* being directly and conclusively to the contrary.

Ante, p. 4, fols. 10-12.

However, the Supreme Court of South Carolina confutes itself and confounds its own logic by citing three New York cases which were offered in evidence by the plaintiff below as constituting "the only evidence" on this point. Those cases are: *Whitney Arms Co.* v. *Barlow*, 63 N. Y., 62; *De Graff* v. *American Linen Thread Co.*, 21 N. Y., 124; *Diamond Match Co.* v. *Roeber*, 106 N. Y., 473.

We commend these cases to the careful examination of this Court. They are, by the South Carolina Court, supposed to prove that a stockholder in a mutual corporation can withdraw from the capital of the corporation more than he has contributed thereto, and more than his profits, and thereby force the corporation to guarantee the maturity of his stock and a fixed rate of interest upon it in violation of the express provisions of the New York law and of the corporate charter and by-laws!

The case of *DeGraff Linen Thread Company* was that of a sale by a corporation to an outside party dealing with the corporation at arm's length, and the corporation having received the *full consideration* was not permitted to rely upon its lack of authority. No question of an attempt to guarantee profits to a stockholder was involved, nor did the plaintiff there seek to recover from the corporation

something for which he had given *no consideration*, as in the case at bar.

Whitney Arms Co. v. *Barlow* is still less in point, as it merely lays down the rule that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party. No question between stockholder and corporation was involved, none as to the right to guarantee the value of stock or its rate of earnings.

The case of *Diamond Match Co.* v. *Roeber* is equally beside the mark, involving as it does a contract in restraint of trade and a branch of the doctrine of estoppel.

No question between stockholder and corporation exists in either of these three cases. How these three cases could prove as *matter of fact* what the Supreme Court of South Carolina says they do, is beyond ordinary comprehension.

On the other hand, the law of New York upon the question of the charter powers of plaintiff in error and the contract rights of defendant in error as a stockholder in the association was proven by undisputed evidence in direct conformity with the rule laid down by this Court in the *Wiggins Ferry* case.

Ante, pp. 4–5, fols. 10–14.
Chicago, &c., R. R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

The Supreme Court of South Carolina will not be permitted to ignore this undisputed proof upon the very point in issue and under the guise of "construing" a contract not only impair the obligation of the contract but deprive plaintiff in error of its property and refuse to give *any* faith or *any* credit to the express provisions of the statutes of New York and the plain, unequivocal decisions of the courts of New York applying and interpreting those statutes. It has been well said by one of the great Judges of this Court: "We shall never immolate truth, justice and

the law because a State tribunal has erected the altar and decreed the sacrifice."

Swayne, *J.*, in Gelpecke v. Dubuque, 1 Wall., 175, 206.

The entire contention of counsel for defendant in error in support of the motion to dismiss or affirm is really embodied in the following quotation from their brief:

"The statutes introduced in evidence by the defendant do not, in express terms, forbid building and loan associations from making such contracts as that made with Ebaugh. The conclusion that such contracts are forbidden by these statutes can be reached only by construction. Mere errors in the construction of the statute of another State furnishes no basis for a federal question."

Brief for Defendant in Error in support of Motion, p. 5.

Later on they insist that "reference to the proceedings in the State courts in the case at bar will conclusively show that the validity of the New York statutes was not denied, and that the error, if any, was in their construction."

Brief for Defendant in Error, p. 6.

They then quote the Referee's report in the trial Court to prove their contention.

Brief for Defendant in Error, pp. 6 and 7.

By the quotation made it appears that the learned Referee satisfied his conscience and "construed" the laws of New York by saying: "I do not see why such an association may not issue stock *to be fully paid up* (the italics are ours) by seventy-eight monthly payments and to be redeemed at par at the end of that time."

Brief for Defendant in Error, p. 7.

Neither do we see why seventy-eight monthly payments that *fully paid* up the stock would not mature it!

But that is not the question here, either as one of "construction" or otherwise.

The point is that seventy-eight monthly payments of *seventy five cents per month* do not amount to one hundred dollars, but only to *fifty-eight dollars and fifty cents!* Hence the stock has not matured unless the "dividends" credited from profits are sufficient to mature it—that is to carry it to its par value—and in the case at bar the *undisputed* evidence was that the stock had not attained its maturity value.

Transcript, p. 16, evidence of D. W. Ebaugh.

Transcript, pp. 43, 44, 45, 46, evidence of N. C. Visscher.

That he had only made seventy-eight monthly payments of seventy-five cents each upon each share, defendant in error admits in the complaint filed by him as plaintiff below.

Transcript, pp. 2 and 3; Paragraphs V., VI. and VII.

The answer of the defendant corporation denied that the stock had matured.

Transcript, pp. 6-9, Paragraphs "Fifth," "Seventh," "Eighth" and "Twelfth."

Defendant in error, as plaintiff below, offered no evidence of the maturity of the stock, and the evidence for plaintiff in error, as defendant below, affirmatively proved that it had not matured.

Hence the "conclusion" of the Referee, as above quoted, is either beside the mark or a mere pretext upon which to deprive plaintiff in error of its property and to refuse to give full faith and credit to the laws of New York.

The laws of New York were not "construed," they were ignored!

The only question was whether the *undisputed* laws of New York and the plain provisions of the New York statutes should be held to govern the case, or whether it should be decided as it was in the Welling case, that: "*Whatever may be the laws of New York, we do not think they should be enforced in this State*"?

Ante, p. 7, fol. 19.

The decision of the Supreme Court of South Carolina was that the statutes and decisions of New York should not be given full faith and credit, but that on the pretense of "construction" the "federal question" should be eliminated, if possible.

That it has not been and cannot be so eliminated is manifest upon the face of the New York statutes, the plain meaning of which, even though there were not, as there are, half a score of New York cases so construing them, is that defendant in error cannot recover the par value of his stock until it has become matured,—that is, fully paid,—either by his payments of "dues" or "calls" at the rate of seventy-five cents per month, or by such payment plus a *pro rata* share of the profits, credited as dividends.

There was expert testimony as to the laws of New York and their construction by the courts of New York upon this point, and that evidence was not rebutted or impeached in any way.

Transcript, p. 42, evidence of D. A. Pierce.

Such evidence was corroborated by the giving in evidence of a case decided by the General Term of the Supreme Court of New York, and is conclusive.

O'Malley *v.* People's B. & L. Assn., 92 92 Hun (N. Y.), 572; Transcript, p. 38.

Chapter 122 of the Laws of New York of 1851 expressly provides that: "It shall be lawful for the trustees to call in and demand from the stockholders respectively, all such sums of money by them subscribed, at such times and in such payments or instalments as the articles of association shall prescribe."

Transcript, p. 32, paragraph 4.

The articles of incorporation of the association accordingly provide that: "The monthly dues per share shall be seventy-five cents."

Transcript, p. 50.

And the by-laws contain the following provisions on the same subject:

Sec. 13. Each share of stock shall be charged with any and all amounts that may be owing from the shareholder or his assigns to the association, whether as dues, loans, fines, interest or premiums, and all certificates of stock in said association shall, whether mentioned therein or not, be subject to a lien thereon, to secure any such indebtedness, and the right to deduct and withhold the amount of any such indebtedness is hereby expressly reserved to the association.

Sec. 14. *All shareholders shall pay, or cause to be paid, a monthly instalment of seventy-five cents on each share named in their certificate, until the same shall be fully paid;* said instalment to be paid to the association on or before the last Saturday of each month. Shareholders are required to pay monthly instalments without notice.

Transcript, p. 60, By-laws, Art. XIV., §§ 13 and 14.

There is no "construction" needed. The language is plain and unequivocal.

After his seventy-eight seventy-five cents per share monthly payments had been made defendant in

error was notified by the association that his shares had not matured, and that he must either continue his monthly payments until maturity or withdraw his stock at its withdrawal value.

Transcript, p. 46,
Letter of C. A. Pooler, Secy. to D. W. Ebaugh.
See also: Transcript, pp. 44, 45.

Defendant in error refused to continue his payments or to accept the withdrawal value of the stock and brought his action in the State court to recover the par value of his stock, although such stock was only a little more than half paid in. Had his demand for payment in full been complied with the directors of the association would have been violating the express and unequivocal provisions of the two New York statutes under which the association was incorporated.

Laws of N. Y., 1851, Ch. 122, § 7, Transcript, p. 32; as amended,
Laws of N. Y., 1875, Ch. 564, § 1, Transcript, pp. 35 and 36.

Taking these several provisions of the statutes of New York and the articles of incorporation and by-laws of plaintiff in error into consideration, it will be seen that they repeatedly provide that a stockholder must pay his monthly payments until his stock reaches its par value, and that if he withdraws before maturity, he can only have the withdrawal and not the par value of the stock, and such withdrawal value is limited to "the amount of the monthly instalments that have been paid with such additional interest (dividends), if any, as the by-laws may provide, *except that the same shall not exceed the net earnings of the stock.*"

Transcript, p. 51, Articles of Incorporation, ¶ XII.

The by-law provisions relating to withdrawals contain like limitations.

Transcript, p. 60, By-Laws, Art. XIV., §§ 18 and 19.

In the light of these statutory provisions and the terms of the articles of association and by-laws of plaintiff in error conforming to them, is it not manifest, that in requiring payment to defendant in error of the par value of his stock, the Supreme Court of South Carolina did not content itself with "construing" the contract and the laws of New York, but instead impaired the obligation of the contract, denied the plaintiff in error the equal protection of the laws, deprived it of its property, without due process of law, and necessarily and directly refused to give "full faith and credit" to the laws of New York?

V.

NOT ONLY DOES THE JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA DENY FULL FAITH AND CREDIT TO THE LAWS OF NEW YORK, BUT IT ALSO DEPRIVES PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, DENIES TO IT THE EQUAL PROTECTION OF THE LAWS, IMPAIRS THE OBLIGATION OF A CONTRACT, AND DENIES TO PLAINTIFF IN ERROR ANY REMEDY IN THE COURTS OF SOUTH CAROLINA UPON A CONTRACT VALID UNDER THE LAWS OF NEW YORK AS THE PLACE BOTH OF THE MAKING AND PERFORMANCE OF SUCH CONTRACT.

A decision of a State court having such effects as these cannot meet with the approval of this Court, must be in direct contravention of several provisions of the Constitution of the United States, and

stands condemned by numerous decisions of this Court.

"It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this Court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this Court should, or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion."

Jefferson Branch Bank *v.* Skelly, 1 Black, 436, 443.

McCullough *v.* Virginia, 172 U. S., 102, 109.

This Court when called upon to interpret a contract made under the laws of a State looks first to the decisions of the courts of such State in determining the meaning and construction of the laws under which the contract was made.

Sioux City R. Co. *v.* North American Trust Co., 173 U. S., 99, 100.

In like manner the courts of every State are required by the Constitution to give full faith and

credit to such laws and decisions, if properly given in evidence, when construing a contract entered into and to be performed in a sister State.

Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

And the right of the parties to contract under and subject to the laws of New York neither the legislature nor the courts of South Carolina can abridge or deny.

R. S. U. S., § 1977.
Yick Wo *v.* Hopkins, 118 U. S., 356, 369.
Santa Clara Co. *v.* Southern Pacific R. Co., 118 U. S., 394, 396.

The contract of membership of defendant in error with plaintiff in error, being a contract made and to be performed in the State of New York, must not only be construed in accordance with the laws of New York, but the Courts of South Carolina are forbidden by the XIVth amendment to the Constitution of the United States to deny to plaintiff in error the "equal protection of the laws" by refusing to enforce it in that State in accordance with the laws of New York.

Allgeyer *v.* Louisiana, 165 U. S., 578.
Holden *v.* Hardy, 169 U. S., 366, 391.

And any failure to so enforce the contract is a denial of "full faith and credit" to the laws of New York.

Huntington *v.* Attrill, 146 U. S., 657, 666.

It should not be overlooked that this litigation, instead of being instituted in the jurisdiction of the corporate situs, as it should have been (Clark *v.* Mutual Reserve Fund Life Assn. (D. C.), 43 L. R. A., 390, 397; Taylor *v.* Mutual Reserve Fund Life Assn. (Va.), 45 L. R. A., 149; Leary *v.* Columbia River, &c., Co., 82 Fed. Rep., 775; Sidway *v.* Missouri Land, &c., Co., 101 Fed. Rep., 481: Republican

Mountain Silver Mines *v.* Brown, 58 Fed. Rep., 644), was begun in South Carolina by defendant in error *seeking affirmative relief*, and prosecuted to judgment there upon the principle that the courts of South Carolia were not bound to enforce contracts made and performable in New York, in accordance with New York laws, but could enforce the New York law so far as it was advantageous to defendant in error, and deny the application of plain, unequivocal, statutory provisions of New York when adverse to his interests. This may be "due process of law," but if so it is neither justice nor honesty, nor does it accord to plaintiff in error the "equal protection" of the laws which the XIVth amendment guarantees.

The contention of defendant in error is in effect that this contract with the plaintiff in error is not embodied in the stock certificate, articles of incorporation and by-laws, taken together, but is limited to the provisions of the stock certificate, and that there is in fact no such contract as that claimed by plaintiff in error; and the courts of South Carolina, by ignoring the provisions of the New York statutes and of the articles of association and by-laws and the decisions of the New York courts, virtually sustain this contention.

"We have often had occasion to say that this Court, when reviewing the final judgment of a State Court upholding a State enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the State enactment."

Chicago, &c., R. *v.* Nebraska, 170 U. S., 57, 68.

Von Hoffman *v.* Quincy, 4 Wall., 535, 550.

If this Court thus protects a contract against State legislation under the contract clause of the Federal Constitution, will it not protect a contract

against the decision of a State court which refuses full faith and credit to the laws of a sister State and abrogates a contract upon the pretense of construing it? Repudiation and confiscation are not "construction" and "interpretation."

See Western Mass., &c., Ins. Co. *v.* Hilton, 42 App. Div. (N. Y.), 52, 58, 59.
Chicago, &c., R. Co. *v.* Wiggins Ferry Co., 108 U. S., 18, 22.
Chicago, &c., R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

The decision of the Supreme Court of South Carolina in the case at bar denies to plaintiff in error all remedies upon its contract with defendant in error as a stockholder and refuses to hold him to his obligations as such. No State can so deny the enforcement within its jurisdiction of valid contracts under the laws of a sister State.

Edwards *v.* Kearzey, 96 U. S., 595, 600, 601.
The Homestead Cases, 22 Gratt. (Va.), 266; s. c., 12 Am. Rep., 507, 514, 515.
White *v.* Hart, 13 Wall., 646, 654.
Cæsar *v.* Cappell, 83 Fed. Rep., 403.
Eastern Building & Loan Assn. *v.* Bedford, 88 Fed. Rep., 7.
Allgeyer *v.* Louisiana, 165 U. S., 578.

It also seems to us that the decision of the Supreme Court of South Carolina deprives plaintiff in error of its liberty to contract and of its property without "due process of law."

The effect of the decision is to require plaintiff in error, in violation of the statutes of New York and the provisions of its charter and by-laws, to pay defendant in error a sum of money for each share of stock held by him, largely in excess of payments made by him upon the stock, plus his *pro rata* share

of the profits of the corporation (*ante*, p. 28). This certainly deprives the corporation of its property and interferes with its liberty of contract. But does it do so without "due process of law"?

"This Court has never attempted to define with precision the words 'due process of law.'"
Holden *v.* Hardy, 169 U. S., 366, 389.

But the constitutional restriction undoubtedly applies to the *judicial* as well as to the executive and legislative powers of a State.
Murray's Lessees *v.* Hoboken Land Co., 18 How., 272, 276.

Hence, we submit that a State court cannot by *judicial legislation* abrogate a contract valid in another State, entered into under the laws of that State and performable in such other State, without violating that clause of the XIVth amendment to the Constitution of the United States, which provides that no State "shall * * * deprive any person of life, liberty or property without due process of law."
Holden *v.* Hardy, 169 U. S., 366, 390, 391.
Allgeyer *v.* Louisiana, 165 U. S., 578.

"For 'upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them;' and 'if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be de-

cided to this court for final and conclusive determination.'"

In re Wood, 140 U. S., 278, 286.
Robb *v.* Connolly, 111 U. S., 624, 637.
Neal *v.* Delaware, 103 U. S., 370, 386, 387.

We are aware that it has been held by this Court that only State statutes, not judicial decisions, impair the obligation of a contract within the meaning of § 10, Art. I. of the Constitution of the United States.

New Orleans Water Works Co. *v.* Louisiana Sugar Co., 125 U. S., 18, 30.
Knox *v.* Exchange Bank, 12 Wall., 379, 383.

But notwithstanding these decisions we direct attention to the opinions of the Supreme Court of South Carolina in the case at bar and in the Welling case (Transcript, p. 67; 56 S. C., 280), as virtually "Laws" of South Carolina made subsequent to the contract between the parties and beyond question impairing the obligation of the contract.

Why such a "law" is not within the meaning of the constitutional provision in a case like this seems by no means clear. At any rate, the decision in the case at bar did deny the equal protection of the laws to plaintiff in error, and did refuse full faith and credit to the laws of New York.

It would certainly be anomalous to hold that a contract made and to be performed in New York and valid under the laws of New York could be impaired as to its obligation by the Supreme Court of South Carolina, at the suit of a party resident in that State, in violation of the plain terms of the contract and of the laws of New York, without the denial of full faith and credit to the laws of New York. Yet such is the effect of the contention of counsel for defendant in error in this case.

VI.

THAT A BUILDING AND LOAN ASSOCIATION CANNOT BY CONTRACT FIX THE MATURITY PERIOD OF ITS STOCK SO AS TO GUARANTEE AN ESTIMATED RATE OF PROFITS OR EARNINGS IS SETTLED LAW, NOT ONLY IN NEW YORK BUT IN EVERY JURISDICTION WHERE THE QUESTION HAS DIRECTLY ARISEN.

King *v.* International Assn., 170 Ill., 135, 142.
Royal Trust Co. *v.* Culver, 87 Ill. App. Rep., 630.
Bertche *v.* Equitable Loan Assn., 147 Mo., 343.
Schell *v.* Equitable, etc., Assn., 150 Mo., 103.
Province *v.* Interstate B. & L. Assn. (Tenn.), 58 S. W. Rep., 265.
Heslin *v.* Eastern B. & L. Ass'n, 28 Misc. (N. Y.), 376, 378.

And it is equally well settled that the contracts of such associations with their members must be construed in accordance with the laws and judicial decisions of the State of the corporate *situs* and the terms of the corporate charter.

Bennett *v.* Eastern B. & L. Assn., 177 Pa. St., 233; s. c., 55 Am. St. Rep., 723, 726, 727.
Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.
Campbell *v.* Eastern B. & L. Assn. (Va.), Appendix, p. 49.
Eastern B. & L. Assn. *v.* Bedford, 88 Fed. Rep., 7.

Such is the general doctrine with relation to corporate contracts.

Washington Cent. Bk. *v.* Hume, 128 U. S., 195, 206, 207.

Coghlan *v.* So. Carolina R. Co., 142 U. S., 101, 109.

Pritchard *v.* Norton, 106 U. S., 124, 136.

Nor can the contention of the defendant in error that he was induced to become a stockholder by representations that the stock would mature in seventy-eight months avail him as against this doctrine.

Upton *v.* Tibilcock, 91 U. S., 45, 50.

VII.

THE EXISTENCE OF "A FEDERAL QUESTION" IN THIS CASE, HAS, WE THINK, BEEN DEMONSTRATED.

WE SUBMIT THAT THE FEDERAL QUESTIONS SO SHOWN BY THE RECORD WERE FULLY RAISED AND PRESENTED IN THE STATE COURT; THAT THE DECISION OF THE SUPREME COURT OF SOUTH CAROLINA WAS AGAINST THE CONSTITUTIONAL RIGHTS CLAIMED BY PLAINTIFF IN ERROR, AND THAT, THEREFORE, THIS CASE WAS PROPERLY BROUGHT TO THIS COURT BY WRIT OF ERROR.

"But the true and rational rule is, that the Court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Bridge Proprietors *v.* Hoboken Co., 1 Wall., 116, 143.

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

Chapman *v.* Goodnow, 123 U. S., 540, 548.
Roby *v.* Colehour, 146 U. S., 153.
Dewey *v.* Des Moines, 173 U. S., 193, 199.
Keokuk, &c., Bridge Co. *v.* Illinois, 175 U. S., 626, 634.

It has already been pointed out that the "Federal questions" were specifically raised in the Court below; relied upon there, and by that court decided adversely "by necessary intendment" to the claims of plaintiff in error.

Ante, pp. 6–9, fols. 16–25.

And where the Federal question was necessarily raised and must have been decided adversely to the claim of plaintiff in error this Court will not dismiss the writ of error.

Eureka Lake, &c., Company *v.* Superior Court, 116 U. S., 410.
Des Moines, &c., Co. *v.* Iowa Homestead Co., 123 U. S., 552.
Green *v.* Van Buskirk, 5 Wall., 307.

VIII.

THE CASES RELIED UPON BY COUNSEL FOR DEFENDANT IN ERROR ARE NOT IN POINT AND DO NOT ESTABLISH THEIR PROPOSITIONS: (*a*) THAT NO FEDERAL QUESTION IS INVOLVED, OR (*b*) THAT THE DECISION OF THE SUPREME COURT OF SOUTH CAROLINA ONLY INVOLVED THE "CONSTRUCTION" OF THE LAWS OF NEW YORK AND DID NOT DENY TO THEM "FULL FAITH AND CREDIT."

Briefly reviewing the principal cases cited by counsel for defendant in error, we find:

1. The case of *Glenn* v. *Garth* is not in point, because as MR. CHIEF JUSTICE FULLER, who delivered the opinion in that case and granted the writ of error in this one, well says: "This record may be searched in vain for any proof that, as matter of fact, the public acts of Virginia had, by law or usage in Virginia, any other effect than was given them in New York."

Glenn *v.* Garth, 147 U. S., 360, 369.

In the case at bar the evidence to show this is clear, uncontradicted and conclusive.

Ante, pp. 3-5, 12-16, fols. 8-14, 35-48.

2. In *Lloyd* v. *Matthews*, the laws of Ohio were not proved as a fact in the Kentucky court, and, therefore, the Court of Appeals of that State "was obliged to determine the case on the record, and plaintiff in error had failed to plead the construction given the Ohio Statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the State of Ohio, or to prove the common law of that State by the parol evidence of persons learned in that law, or to put in evidence the laws of that State as printed under the authority

thereof or a certified copy thereof." * * * "The Court of Appeals was left, therefore, to construe the parts of the Ohio laws that were pleaded as it would local laws; and it is settled that *under such circumstances*, where the validity of a State law is not drawn in question but merely its construction, no Federal question arises."

Lloyd *v.* Matthews, 155 U. S., 222, 227.

In the case at bar everything that this Court says was not done in the case just cited, to prove the State laws, was done, and proof having been made of the State statutes of New York and their construction by the courts of New York full faith and credit must be given to such statutes and to the New York decisions construing the same.

Hanley *v.* Donoghue, 116 U. S., 1, 3.

"It does not seem to have occurred to the Chief Justice (Taney) that the writ could be maintained upon the ground of a denial of full faith and credit to the Mississippi Statute by the construction given by the Louisiana Court."

Fuller, *C. J.*, in Glenn *v.* Garth, 147 U. S., 369.

3. The case of *Banholzer* v. *New York Life Ins. Company* rests upon the authority of Glenn *v.* Garth and Lloyd *v.* Matthews and clearly was not intended to go beyond the doctrine of those cases. "*The parties mutually agreed* that this should be a New York contract and construed according to the laws of that State. The decisions of the highest Court of that State as to the construction of such a contract and of the statutes of New York must therefore be accepted as conclusive upon the parties." So said the Supreme Court of Minnesota in that case (178 U. S., 406, 407). Later, in a second opinion the Minnesota Court reviewed the contention that the case before it was "distinguishable" from the New York case which had been followed in the first opinion;

queried whether the construction of the New York Statute by the New York court was binding *if the construction of the statute was not necessary to the decision* (Carroll *v.* Carroll, 16 How., 275, 286, 287), and then pretermitted the question so raised, saying: "We shall not decide that question, as we are satisfied that if the construction of the New York statute is to be considered *res integra* the notice required by it was not applicable," &c. (178 U. S., 408). On such a state of facts this Court granting, *arguendo*, that the Supreme Court of Minnesota had erred in its construction of the New York case and the New York statute, yet held, that as the validity of the statute was not denied and its meaning was first sought in a decision of the New York courts, the case fell within the doctrine of *Glenn* v. *Garth* and *Lloyd* v. *Matthews*, *supra*.

Banholzer *v.* New York Life Ins. Co.,
178 U. S., 408.

There is no analogy between the *Banholzer case* and the case at bar.

In this case the full faith and credit clause of the Federal Constitution was expressly invoked. It was insisted that under that clause the New York statutes, and an authority and franchise exercised under them, must be given the same effect given them by the courts of New York. The decision of the Supreme Court of South Carolina, denies them that effect and relies upon the *Welling case*, decided by the same Judge, in which it was held that: "Whatever may be the laws of New York, we do not think they should be enforced in this State" (*Ante*, p. 7). Relying upon this doctrine the Supreme Court of South Carolina, say in the case at bar: "We fail to discover any facts causing us to differentiate this case from those hereinbefore mentioned."

Transcript, pp. 67, 68.

It is for this Court to say, and it is its duty under the Constitution to determine, whether in this de-

cision the Supreme Court of South Carolina gave to the laws of New York and the contract made under *those* laws the same effect that such laws and contract have in the courts of New York.

Green *v.* Van Buskirk, 5 Wall., 307, 311, 314.
Christmas *v.* Russell, 5 Wall., 290, 302.
Mills *v.* Duryee, 7 Cr., 481, 483, 484.
Carpenter *v.* Strange, 141 U. S., 87, 103.
Dupasseur *v.* Rochereau, 21 Wall., 130, 139.
Huntington *v.* Attrill, 146 U. S., 657, 666.
Chicago, &c., R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615, 622, 624.
Chicago, &c., R. Co. *v.* Stevens, 174 U. S., 710.

"It was insisted on the one side, and denied on the other, that the faith and credit which the judicial proceedings in the courts of the State of Illinois had by law and usage in that State, were denied to them by the Supreme Court of New York in the decision which was rendered.

"Whether this was so or not could only be properly considered when the case came to be heard on its merits; but this Court, in denial of the motion to dismiss, held that the Supreme Court of New York necessarily decided *what* effect the attachment proceedings in Illinois had by the law and usage in that State; and as it decided against the effect which Green claimed for them, this Court had jurisdiction under the clause of the Constitution which declares 'that full faith and credit shall be given in each State to the public acts, records and judicial proceedings in every other State,' and the Act of Congress of 1790, which gives to those proceedings the same faith and credit in other States that they have in the State in which they were rendered."

Green *v.* Van Buskirk, 7 Wall., 139, 145.

That the opinion of the Supreme Court of South Carolina in the case at bar denies the claims of the plaintiff in error under the laws of New York, and denies full faith and credit to those laws is manifest upon the face of the opinion.

Transcript, pp. 67 and 68.

That the opinion is itself a part of the record in the case, and, therefore, may be looked to as such is shown by the certificate of the Clerk of the Supreme Court of South Carolina, wherein it is recited: "I do further certify that the opinion rendered by the Court in said case is a part of the record of said case."

Transcript, p. 1.

Hence, this Court may look to the opinion of the Supreme Court of South Carolina, as it does to opinions in cases coming up from the Supreme Court of Louisiana.

New Orleans Waterworks *v.* Louisiana Sugar Co., 125 U. S., 18, 27.

Eagan *v.* Hart, 165 U. S., 188, 189.

Murdock *v.* Memphis, 20 Wall., 590, 633.

And the federal question having been raised and decided adversely to the contention of plaintiff in error this Court has jurisdiction to determine this case upon its merits and the motion to dismiss or affirm should be denied.

We do not deem it necessary to further review the cases cited by counsel for defendant in error to show that the Supreme Court of South Carolina did not refuse to be bound by the decisions of the court of last resort of New York.

Brief for Defendant in Error, pp. 8 and 9; *ante*, p. 42.

We think it has already been demonstrated that the Supreme Court of South Carolina refused to

give full faith and credit to the laws and judicial proceedings of the State of New York.

The plain language of the New York statutes needs no interpretation or construction. Those statutes were merely denied effect by the Supreme Court of South Carolina because that Court regarded itself as not bound "by comity" to give them effect. Thus the rule of constitutional obligation was ignored and the jurisdiction of this Court established.

What the New York law is we have already discussed sufficiently for the purposes of the motion now before the Court. Upon a hearing on the merits that question will properly call for full consideration.

Green *v.* Van Buskirk, 5 Wall., 307; s. c. 7 Wall., 139.

Admittedly the *O'Malley case*, relied upon by plaintiff in error, was a direct authority in support of the contention of plaintiff in error as to the meaning and effect of the New York law.

Brief for Deft. in Error, p. 8.
Transcript, p. 38; s. c., 92 Hun (N. Y.), 572.

It makes no difference that the O'Malley case was not decided by the court of last resort; it was not appealed from and has recently been followed in New York by the decision of a Court that in such a case, when the decision is unanimous, is a court of last resort.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.
Code of Civil Procedure of N. Y. (1900), § 191.

That such decisions are entitled to full faith and credit in the Courts of sister States is settled by the decisions of this Court.

Hollinger *v.* Davis, 146 U. S., 314, 319.

Besides, the decisions in the Court of Appeals of New York in the several cases which plaintiff in error gave in evidence upon the trial of this case below, construe the New York Acts of 1851 and 1875, and together with the articles of association and by-laws of plaintiff in error, are conclusive as to the construction and effect of the New York statutes in question in New York.

Concordia Ass'n *v.* Read, 93 N. Y., 474.
People *v.* Lowe, 117 N. Y., 175.
Englehardt *v.* Fifth Ward Ass'n, 148 N. Y., *281.*

The question as to what the common law of New York is apart from the statutes under consideration, does not arise in this case and hence we shall not follow counsel for defendant in error in their discussion on that subject.

Brief for Defendant in Error, pp. 10–12.

Having, as we believe, shown the existence of a federal question; the decision of that question adversely to the claims of plaintiff in error, the incorrectness of such decision and the gross denial of justice incident thereto, we ask that the motion to dismiss or affirm be denied, and that this case stand for hearing upon its merits. We shall be glad to consent to its advancement in order that it may be argued orally with the Welling and Bennoitt case, which will shortly be reached upon the call of the term calendar of this court.

Respectfully submitted,

Wm. Hepburn Russell,
Wm. Beverly Winslow,
Counsel for Plaintiff in Error.

APPENDIX "A."

Supreme Court of Appeals of Virginia.

CAMPBELL v. EASTERN BUILDING AND LOAN ASSOCIATION OF NEW YORK.	RICHMOND, December 6, 1900.

OPINION BY JUDGE GEORGE M. HARRISON.

The appellant being the holder of fifty-eight shares of the capital stock of the Eastern Building and Loan Association, applied for and obtained from said association an advance or loan upon his stock of $5,800. As security for this loan the stock was pledged as collateral, and a deed of trust given by appellant, upon certain real estate. This deed secures the payment of $6,849.34, evidenced by seventy-six promissory notes of even date with the deed, each for the sum of $91.84, except the three maturing last, which are for $48.34 each, all payable to the association at its home office in Syracuse, N. Y., and falling due, one, on the last Saturday of each succeeding month, until all are paid, being the dues on the stock and the interest and premium on the loan. The appellant paid the notes as they fell due down to and including that due on the last Saturday in November, 1898, when the payments ceased, leaving unpaid several of the notes. In December, 1898, the appellant instituted this suit praying that the contract be rescinded; that the defendant association be enjoined from collecting any further sums by reason of the

transaction; that it be compelled to cancel and deliver to appellant the five notes remaining unpaid; to cancel and destroy the certificates of stock; to wholly release and cancel the deed of trust, and repay to appellant the sum of $1,069.60, which represented the amount paid to the association in excess of the loan and six per cent. interest.

Conceding that the demurrer to the bill was properly overruled, and proceeding at once to the merits of the case, we will consider, in the order stated in the petition for appeal, the grounds therein alleged in support of appellant's right to the relief asked.

It is contended that the parties entered into a definite contract, whereby it was agreed that the entire debt should be discharged and paid off in seventy-eight monthly installments; that if this agreement was a mistake on the part of the association, such a mistake releases the appellant, and entitles him to a rescission of the contract upon repayment by him of the money which he received, with six per cent. interest thereon. And that if the association is released from the agreement, because it had no power to make such a contract, the appellant is also released and entitled to a restoration of the *status quo*.

It is not denied that the contract in question was a New York contract, and to be construed in accordance with the laws of that State.

We are unable to distinguish this case, in principle, from the case of Building Association *v.* Tinsley, 96 Va., 322. In that case, the loan was for a definite fixed period of eight years, the borrower undertaking to pay the interest and premiuns thereon in monthly installments; this he did for more than four years, when he ceased paying, and brought suit seeking to be released from his contract upon the ground that the loan was usurious. Following the decision of the Supreme Court of New York, in the case of O'Malley *v.* Building Association, we held that the association did not possess the power to issue a certificate specifying a

fixed period for the maturity of its stock, and that such a clause in the certificate should be construed as an estimated period of maturity; that if the borrowing member had complied with all the rules and regulations of the association, and fully kept his contract during the entire eight years, in which it was estimated that his stock would mature, and had then demanded payment, *he would only have been entitled to receive what his stock had then earned.*

The terms and conditions expressed in the certificates of stock, in connection with the application for membership, and the by-laws of the association form the contract between the association and each shareholder therein. The deed of trust given by appellant expressly provides that the loan in question was made pursuant to and accepted under the provisions of the by-laws which were thereby made a part of the contract, and appellant further covenanted and agreed therein that he would keep and perform all promises and engagements made and entered into with the association according to the true intent and meaning of its by-laws and articles of incorporation.

The contention of appellant throughout is based upon the theory that he is an ordinary borrower of money, ignoring the fact that he is a member of a mutual association, into which he has voluntarily entered, and bound by its articles and by-laws, which constitute part of his contract, and must therefore be given their proper effect in construing that contract. The members of the association have united together in a business venture for the common benefit. It is a mutual association and equality of right according to the interest of each member is the fundamental idea upon which it rests. The definite contract was made doubtless in good faith by both parties, but appellant had no legal right to rely upon such a consummation, he was taking chances with his fellow shareholders that the earnings would be sufficient, in the time specified, to declare, not his alone, but all

the stock matured. At the end of the seventy-eight months, if the stock had not matured, each shareholder could receive what his stock had then earned, or he could go on paying until it did mature. Appellant occupied no better or different position, as a borrower, than the mere holder of stock. He remained a member of the association, the money advanced being upon his stock at its maturity or par value. He had fifty-eight shares and was advanced $5,800. It was never contemplated that he should return the $5,800, but it was the intention and purpose of the contract, that he should continue to pay the dues on his shares, and the interest and premium on the advance, until his stock was matured which would cancel the $5,800.

If the contention of the appellant should prevail it would be at the expense of his fellow stockholders, and if each stockholder should demand settlement upon a like basis, it would thwart the scheme and purpose of the association and probably bankrupt it.

It is further contended that appellant is entitled to a rescission of his contract upon the ground that he was induced to become a purchaser of the stock, as a basis of the loan or advance subsequently secured, by fraudulent misrepresentations made by the agents of the association, as to the time when the stock would mature; that but for such representations of material existing facts, he would not have purchased the stock.

As we have already seen, the association itself had no power to guarantee that the stock would be matured in a fixed time, and therefore its agents could not, if they had attempted to do so, bind it by such representations or guarantees. And further, the agents had no power or authority to bind the association by the statements or representations relied on, for the reason that the certificate of stock, the terms of which appellant must be presumed to have known, as well as the by-laws, and the printed literature, which was in the hands of appellant, all expressly provided that no agent had authority to

change the contract in any way, and that the association assumed no obligation for any statements not contained in its printed literature.

A misrepresentation, the falsity of which will afford a ground of action for damages, or a bill for the rescission of a contract, must be as to an existing fact. It must be an affirmative statement of some fact, in contradistinction to a mere expression of opinion, which is ordinarily not presumed to deceive or mislead (Watkins *v.* Wytheville, &c., Co., 92 Va., 1: Max Meadows, &c., Co. *v.* Brady, *Id.*, 71). So far as the representations made in the printed literature are concerned, for reasons already stated, these are not sufficient to entitle appellant to rescind the contract. As to the representations touching the business of the company, they were merely to the effect that judging from its success in the past (it had only been in business a few months), the business would continue to grow to such an extent that the association would be able to fulfill its promise to close up the contract within seventy-eight months. There was no representation of a definite rate of earnings made by the company, upon which any calculation could be made to test the accuracy of this statement. It was the opinion of the agent, based upon speculations and business contingencies running far into the future, that the end desired by all would be realized. They were not affirmative statements of an existing fact such as the law requires, to entitle appellant to the relief asked.

Apart, however, from these considerations it is too well settled to need citation of authority, that where a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud; for if after the discovery of the fraud he treats the contract as a subsisting contract, he will be deemed to have waived his right of repudiation, and must then bring an action for damages for the deceit. And whenever a party to a contract has a right to elect whether he will avoid it or treat it as a subsisting contract, his elec-

ion may be manifested by acts as well as by words, and, when once made, is final, and cannot be retracted (Max Meadows, &c., Co. *v.* Brady, *supra*). It appears from the record that in March, 1898, appellant was informed by an agent of the company that the stock would not be matured in the time specified, and that twenty-eight more monthly installments would be required; and shortly thereafter received from the company its annual report, giving him the same information; whereupon he wrote to the company for a statement of what he owed under his contract; and received in reply a statement showing his indebtedness, based upon the additional monthly payments necessary to mature the stock. Notwithstanding all this clear and authoritative information on the subject, he took no action, but continued to pay his monthly installments until the following November, thus making nine several payments after full knowledge of the facts now relied on as ground for rescission. This was a ratification of the right to demand the additional installments that disentitles appellant to the relief now sought. He says he continued to make the payments, because he thought that, in any event, he would have to perform the obligation into which he had entered; and yet in his bill he asks that $1,069.60, a sum more than sufficient to cover the payments thus made, be refunded to him.

The final contention of appellant is that, if he was under an obligation to continue his payments beyond the seventy-six notes given by him for dues, premium and interest, then the contract is an indefinite one, and void for uncertainty. This position has been sufficiently answered by what has been already said. The company had no power to make anything but an indefinite contract, so far as the time when its stock would mature was concerned. To hold the contract invalid for this reason, would be to hold that all subscriptions to the stock of a building association, when the time for the maturity of the stock was not certain and fixed,

were invalid, whereas the contrary is the settled law governing in the construction of such contracts.

The learned counsel for appellant has commented in strong terms upon the harshness of the contract in question; so long, however, as such associations are permitted to do business in the State, and persons are found willing to embark in the enterprise, by becoming shareholders therein, the courts have no alternative but to enforce the contracts they are authorized to make.

For these reasons the decree appealed from is affirmed.

(A copy teste.)

GEO. K. TAYLOR,
C. C.